In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-23

JOSEPH E. FLYNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on three counts of willfully attempting to evade income taxes, in violation of 26 U.S.C. 7201. He was fined a total of $15,000 and sentenced to three months' imprisonment. The court of appeals affirmed (Pet. App. B). Petitioner here contends that the conduct of the trial judge was prejudicial and that a concededly erroneous charge respecting the deductibility of charitable contributions constituted reversible error.

As the opinion of the court of appeals sets forth (Pet. App. B, pp. 10-13), the evidence showed that petitioner understated his income for the years in question by excluding certain interest income and by taking several improper deductions. In addition to other deductions that were clearly improper, petitioner on his

return claimed several deductions he labeled as "charitable" even though they consisted of gifts to a friend and payments to a school which his children attended. The government did not challenge petitioner's charitable deductions as part of its proof of tax evasion. However, their propriety was questioned on cross-examination.

1. Petitioner contends (Pet. 4-7) that he was deprived of a fair trial by allegedly prejudicial comments by the trial judge. However, petitioner fails to identify any such comment with specificity. See Rule 23(1)(e) of the Rules of this Court. In the court of appeals, petitioner made only generalized allegations of prejudice, which were accompanied by a list of transcript citations. After reviewing the transcript, the court of appeals concluded (Pet. App. B, p. 14) that the trial judge's unfavorable comments, although "unnecessary," were nevertheless "fair" in context and in any event not so numerous "as to be prejudicial." This issue warrants no further review.

2. With respect to the charitable contributions, the trial judge instructed the jury that only contributions to organizations which have received an exemption ruling are deductible. This charge was erroneous—contributions to charitable organizations may in some cases be deducted even if a ruling has not been obtained—but the error was harmless. Petitioner's deductions for charitable contributions were not the basis for his criminal prosecution. His contention is that the trial court's instruction cast doubt upon the validity of those deductions and thereby strengthened the government's showing of willfulness. But of the two charitable deductions challenged by the government on cross-examination, petitioner's counsel conceded that one—the gift to a friend—was not proper (7 R. 44-45; 9 R. 26),[1] and the existence of an exemption ruling was not

[1] "R." refers to the reporter's multi-volume transcript of trial proceedings.

at issue with respect to the validity of the other—the payments to petitioner's children's school. Thus the jury's verdict could not have been affected by the slight error in the court's instruction.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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[2] Contrary to the recitation of facts in the opinion below (Pet. App. 3, p. 12), petitioner did not claim at trial that certain horse-raising and farming expenses were deductible as charitable expenses. He did testify that his horses participated in charitable shows (10 R. 24-27) but he admitted that this participation was for the purpose of winning prize money (13 R. 115-119). The court's instructions concerning charitable contributions therefore did not affect the theory of petitioner's defense at trial.

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